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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 469

ATTY M. JACKSON,

Petitioner,

vs.

BURR LAMBERT,

Respondent.

BRIEF OF RESPONDENT IN ANSWER TO PETITION FOR WRIT OF CERTIORARI.

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To the Honorable, The Supreme Court of the United States:

STATEMENT OF THE CASE.

Petitioner's statement of the case is substantially correct except for the following omissions and inaccuracies.

This action was brought in the District Court of the United States for the Southern District of Indiana by the Petitioner against the Respondent seeking to establish a partnership relation by implication between the two (2) parties. A partition of the assets of the alleged partnership was demanded and an accounting sought of the profits

alleged to have resulted from the operation of the said partnership.

A partnership had been entered into between F. B. Jackson, Jr. (former husband of the Petitioner) and the Respondent, in the State of Texas in August, 1937, for the purpose of drilling oil wells (R. 9), and the Respondent contributed to this partnership certain equipment (R. 26).

F. B. Jackson, Jr. (former husband of the Petitioner) contributed to the partnership a steam drilling rig, derrick and other equipment which was the community property of the Petitioner and the said F. B. Jackson, Jr. (R. 9). The Petitioner admitted in her complaint that her former husband had the right to so dispose of the community property and that the contribution thereof was made with the Petitioner's consent (R. 3).

At the time of the divorce between the Petitioner and her former husband, the said F. B. Jackson, Jr., the partnership between the latter and the Respondent was in existence and was subsequently dissolved (R. 9). When the partnership was dissolved the latter part of May or the first part of June, 1939, the Respondent assumed all of the obligations of the partnership and acquired whatever equipment was owned by it (R. 34). The Respondent had no dealings whatsoever with the Petitioner (R. 32-33) nor communicated with her in any way concerning the partnership between himself and the said F. B. Jackson, Jr. (former husband of the Petitioner) (R. 33, 42). No recognition of any kind was ever given the Petitioner by either her former husband, F. B. Jackson, Jr., or the Respondent, as a partner (R. 54, 56, 58, 59).

The Respondent controverts the statements of the Petitioner found on page 4 of her brief to the effect that the Respondent and the said F. B. Jackson, Jr. (former husband of the Petitioner) with knowledge of the Petitioner's

rights, continued to carry on the partnership business, there being nothing in the record to substantiate such a statement. The Respondent further controverts the statement of the Petitioner found on page 4 of her brief to the effect that the Respondent continued to carry on the business of the partnership using the Petitioner's property and incurring obligations for which she and her property were liable and that the Respondent has continued to carry on said business, there being nothing in the record to substantiate such a statement.

The stipulations filed, speak for themselves and do not admit all of the facts pleaded in the plaintiff's complaint (R. 1-8, 9-10, 64) as stated by Petitioner on page 5 of her brief. The record discloses that the Petitioner's former husband (F. B. Jackson, Jr.) who was the only person with whom the Respondent dealt and with whom he formed a partnership, was not made a party to this proceeding (R. 1-8).

The Trial Court found that during the existence of the marriage between the Petitioner and F. B. Jackson, Jr. (her former husband), she was not a member of the partnership between the said F. B. Jackson, Jr. and the Respondent; that at the time of the divorce and thereafter, neither the said F. B. Jackson, Jr., nor the Respondent, by word or conduct, expressly or impliedly, accepted or recognized the Petitioner as a partner with them or either of them in the partnership and that during the period of the existence of the partnership of the said F. B. Jackson, Jr. and the Respondent, the Petitioner never became a member thereof (R. 67). The Trial Court concluded that the Petitioner was not a member of the partnership between F. B. Jackson, Jr. (her former husband) and the Respondent, Burr Lambert (R. 67) and judgment was rendered against the Petitioner that she take nothing in the action (R. 68-69).

From this judgment the Petitioner appealed to the Circuit Court of Appeals for the Seventh Circuit (R. 87).

Counsel for the Petitioner did not appear at the hearing of the cause in the Circuit Court of Appeals (R. 99) and the Court affirmed the judgment of the lower Court, without opinion. The Petitioner filed a petition for rehearing which was denied (R. 100).

JURISDICTION.

Petitioner's brief does not contain a statement of the grounds on which the jurisdiction of this Court is invoked, as required by Rule 27(c) of the Rules of this Court.

SPECIFICATION OF ASSIGNED ERRORS.

Petitioner's brief fails to contain a specification of such of the assigned errors as are intended to be urged, as required by Rule 27(e) of the Rules of this Court.

SUMMARY OF THE ARGUMENT.

I.

The United States Circuit Court of Appeals for the Seventh Circuit affirmed, without opinion, the decision of the District Court for the Southern District of Indiana, holding that a partnership relation did not arise between the Petitioner and the Respondent, by implication upon certain facts outlined in Respondent's statement of the case and argument.

II.

The Petition and Brief fail to disclose any conflict between the Seventh Circuit's decision in the case at bar and the decisions of this Court or the decisions of the Courts of Texas, which is the jurisdiction where the controversy arose. The decisions of this Court and the Texas Courts fully support the decision of the Seventh Circuit which affirms the Trial Court's finding that a partnership relation did not arise between the Petitioner and the Respondent.

III.

The Petition and Brief do not disclose any reason for review of the case at bar by Writ of Certiorari. The Petition merely seeks another hearing which is not afforded to a litigant by certiorari to this Court.

ARGUMENT.

PART I.

The Question Involved and the Decision of the Seventh Circuit.

The United States Circuit Court of Appeals for the Seventh Circuit affirmed the decision of the Trial Court which found that no partnership relation arose between the Petitioner and the Respondent by implication. The finding was based upon the following facts (R. 66-67):

(a) Community property owned by the Petitioner and her husband in the State of Texas, was contributed by the latter to a commercial partnership formed between her said husband and the Respondent; and,

(b) A divorce was subsequently granted dissolving the former community estate without a settlement of the property rights of the two (2) spouses (*i. e.*, the Petitioner and her former husband); and,

(c) The commercial partnership between the Petitioner's former husband and the Respondent was carried on subsequent to the divorce and later voluntarily dissolved, without any effort made on the part of the Petitioner's former husband and the Respondent, to settle with the Petitioner and without recognizing or accepting her in any manner whatsoever, in so far as the said commercial partnership was concerned.

The action was brought in the lower Court solely on the theory that the Petitioner became a partner with the Respondent by implication (R. 1-10) and was tried on that theory by the Court (R. 66, 67). On appeal to the Seventh Circuit the sole point upon which the appeal was predicated, was the contention that such a partnership was formed by implication (R. 72-73), although no alleged error or errors in the proceedings in the lower Court were set forth or

asserted. The so-called contested issue mentioned on page 5 of Petitioner's brief, but not supported by any authorities, relating to an accounting upon the theory of tenancy in common was not presented to the Seventh Circuit and as hereinafter demonstrated, is wholly without merit.

Part II.

There Is No Conflict Between the Seventh Circuit's Decision in the Case at Bar and the Decision of the Texas Courts and of This Court.

While the brief filed by Petitioner does not assert that the decision of the Seventh Circuit is in conflict with the decisions of the Texas Courts, the petition does contain such a statement (Petition, p. 3). The decisions cited in the petition and in the brief of the Petitioner have no application whatsoever to the questions involved on the merits and the citations given do not support any grounds for the review of this cause. With the exception of the case of *Taylor* v. *Catalon*, 166 S. W. (2d) 102 (Supreme Court of Texas) cited by the Petitioner in her Petition and Brief, the remaining authorities deal with the obligation of a surviving partner of a firm dissolved by the death of one of the partners, to account and pay over unto the representatives of the deceased partner, such amount or amounts as may be due them after winding up the affairs of the partnership. In the case at bar the question concerning the obligation of a surviving partner to account to the representatives of a deceased partner, on dissolution of a partnership by death, does not arise.

There is no contention in the case at bar to the contrary and the record conclusively establishes that no partnership was ever entered into between the Petitioner, her former husband, F. B. Jackson, Jr., and the Respondent, by express agreement but she asserts that she became a partner with

the Respondent because her marriage with her former husband was dissolved without a settlement of the community estate and, therefore, she and her former husband became tenants in common of whatever property belonged to their community estate which the Petitioner contends included an interest in the commercial partnership between the Respondent and the Petitioner's former husband.

The Trial Court found that the Petitioner's husband disposed of the community property by contributing it to the partnership which he had formed between himself and the Respondent, as he had the right to do under the laws of the State of Texas and which the Petitioner admits was with her consent (R. 3). The Trial Court further found that during the existence of the marriage the Petitioner did not become a member of that partnership and that at the time of the divorce and thereafter, neither her former husband nor the Respondent, by word or conduct, expressly or impliedly, accepted or recognized the Petitioner as a partner with them or either of them in the partnership and that during the period of the existence of the partnership the Petitioner never became a member thereof.

The Seventh Circuit's affirmance of the judgment of the Trial Court is supported by the following propositions and authorities.

The contribution of community property which was owned by the Petitioner and her former husband, F. B. Jackson, Jr., to the partnership of Lambert & Jackson, was a disposition of such property which the Petitioner's former husband had the full right and power to make under the laws of the State of Texas.

Article 4619, Vernon's Civil Statutes of Texas, Annotated.

Locke v. *Locke,* Tex. Civ. App., 143 S. W. (2) 637, 638.

The Petitioner admits that the contribution was made with her consent (R. 3) and further admits in her Petition, that the laws of the State of Texas gave her former husband such right and power (R. 3).

The contribution of the community property by the Petitioner's former husband, transmuted its character and upon such investment the title thereto became vested in the partnership, the only interest remaining, being the right to receive a proper share of the residue of the partnership assets after the payment of partnership debts and the settlement of accounts between the partners. As a member of the community, the Petitioner would share in such residual interest but only after its acquisition by or distribution to her husband. It is the well established rule throughout the United States, including the State of Texas, that a partner in a commercial venture owns no specific interest in partnership assets. In an early decision of this Court in *The Fourth National Bank of the City of New York* v. *The New Orleans and Carrollton Railroad Company, et al.*, 11 Wall. 624, 20 L. Ed. 82, 83, the rule is thus stated:

> "* * * It has repeatedly been determined, both in the British and American Courts, that the property or effects of a partnership belong to the firm and not to the partners, each of whom is entitled only to a share of what may remain after payment of the partnership debts and after a settlement of the accounts between the partners; * * *"
>
> "* * * In *Field* v. *Taylor*, 4 Ves. Jr., 396, it was said that a 'party coming into the right of partner' (in any mode, either by purchase from such partner, as or a personal representative or under an execution or commission of bankruptcy) 'comes into nothing more than an interest in the partnership, which cannot be tangible, cannot be made available, or be delivered but under an account between the partnership and the partner, and it is an item in the account that enough must be left for the partnership debts."

In the State of Texas it has been established that the investment of property in a partnership so completely transmutes its character as to prevent a partner from asserting the right to homestead exemption against his interest without the consent of his partner. This is the pronouncement of the Court of Civil Appeals of Texas in the case of *Egan et ux.* v. *American State Bank*, Tex. Civ. App., 67 S. W. (2) 1081, 1085.

In a partnership accounting suit the Court of Civil Appeals of Texas in *Diamond* v. *Gust,* Tex. Civ. App., 206 S. W. 366, 369, defines the interest of a partner in partnership assets in the following language:

> "Nothing is to be considered as the share of a partner but his proportionate part of the residue or balance after an account has been taken of the debts and credits, including the amounts paid by the several partners in liquidating firm debts. * * *"

While it is granted that under the community property laws of the State of Texas, the Petitioner as the wife of F. B. Jackson, Jr., was entitled to one-half of all gains realized by him from his partnership venture with the Respondent, as well as her proportionate share of any residue forthcoming to him upon dissolution, it is fundamental that she did not, at any time, have or acquire an interest as such in the partnership or its assets. The rule is very clearly stated by a well recognized author on the subject of community property. DeFuniak in his work entitled Principles of Community Property (1934), Volume 1, Section 173, Page 484, discusses the subject as follows:

> "The husband having properly determined, by virtue of his exercise of administration, to place the community property in the commercial partnership, it must be subject to all obligations and demands of the commercial partnership before any right of the wife is enforceable as to such property. Similarly, her half share in profits from the commercial partnership take

effect and are enforceable only in the actual profits to which the husband may be entitled after obligations and demands of the commercial partnership are satisfied. Just because community property is invested in the partnership, just because the wife has a half share in the profits realized by the husband from the commercial partnership, no more makes the wife herself a partner in the commercial partnership than would the husband's employment by a corporation make the wife also an employee of such corporation. * * *"

The Petitioner, while married to F. B. Jackson, Jr., could not, under the laws of the State of Texas, become a partner with her husband or anyone else unless she had first been declared to be a sole trader.

32 Texas Jurisprudence, Page 223.

Kasch v. *Commissioner of Internal Revenue* (C. C. A. 5th), 63 Fed. (2) 466, 468.

Wright v. *State,* Tex. Civ. App., 71 S. W. (2) 352, 353.

There was no evidence in the case at bar and it is not contended by the Petitioner, that she had ever been declared to be a sole trader. Her disqualification is such that even though her separate property is invested in a commercial partnership, the wife is deemed to become at most a creditor to the extent of the investment thus made and not a member of the firm liable for its debts or entitled to share in its profits.

Wright v. *State,* Tex. Civ. App., 71 S. W. (2) 325 353.

Purdom v. *Boyd,* Tex. Sup. Ct., 17 S. W. 606, 607.

32 Texas Jurisprudence, Page 223.

The Petitioner was not accepted or recognized in any manner by either her former husband or the Respondent as a partner. This is the finding of the Trial Court, affirmed by the judgment of the Seventh Circuit. It is the law of

Texas that an ordinary commercial partnership is founded upon a voluntary contract and that parties are not forced into such a relationship against their will. *Manufacturers' Equipment Company* v. *Cisco Clay & Coal Company* (Tex. Civ. App.), 15 S. W. (2) 609, 612, in which the decision of this Court in *London Assurance Corporation* v. *Drennen*, 116 U. S. 461, 6 Sup. Ct. 442, 29 L. Ed. 688, is cited as authority.

It is urged by the Petitioner that she and her former husband, F. B. Jackson, Jr., became tenants in common of all community property held by them at the time of the divorce between the two (2) parties in view of the fact that no property settlement was made between the parties in connection with the divorce. It is granted that under the Texas law a divorce between two (2) spouses owning community property, without a settlement of property rights, dissolves the community and creates a tenancy in common between the spouses as to the community estate. This is the extent of the holding in *Taylor* v. *Catalon* (Sup. Ct. Texas), 166 S. W. 2d 102, cited by Petitioner. After the investment of community property by the Petitioner's husband in the commercial partnership of Lambert & Jackson, the decisions cited above establish that there was retained by him, a residual interest only, in the partnership, and it is submitted that the relationship of tenants in common created between the Petitioner and her former husband, F. B. Jackson, Jr., as a result of their divorce without a property settlement, embraced only that residual interest so far as the partnership of Lambert & Jackson was concerned. Title to the community property originally invested no longer remained in the Petitioner and her former husband and consequently no tenancy in common was or could be created with respect to the specific property originally invested or with respect to any of the assets of the partnership.

It is further urged by the Petitioner that inasmuch as she

and her former husband became tenants in common in her husband's one-half (½) interest in the partnership upon the rendition of the divorce decree that she became a partner by implication in the partnership because the two (2) partners, *i. e.*, the Respondent and her former husband, failed to settle with her and continued to carry on their partnership business. This conclusion of the Petitioner is wholly unsupported by authority. It seems quite clear that the dissolution of the marital relationship between the Petitioner and her former husband did not and could not have any effect whatsoever upon the partnership existing between her former husband and the Respondent. She was not a member of the partnership and she had no interest therein. The Petitioner could not, by virtue of the divorce without a property settlement, acquire an interest in the partnership of her former husband and the Respondent. Even in the case of the dissolution of a partnership by death, the heirs of the deceased partner do not acquire an interest in the partnership previously existing between such deceased partner and others. This is clearly demonstrated in the opinion of the Circuit Court of Appeals for the Seventh Circuit in *New York Life Insurance Company* v. *Hageman* (C. C. A. 7th), 80 Fed. (2) 446, 448, cited by the Petitioner, where the Court, at page 448, says:

> "It thus appears that the interest of a deceased partner in the partnership property does not pass to his personal representative, but vests in the surviving partner or partners for purposes of liquidation and settlement. *Andrews* v. *Stinson*, 254 Ill. 111, 98 N. E. 222, Ann. Cas. 1913B, 927; *Hayward* v. *Burke*, 151 Ill. 121, 37 N. E. 846; *Bauer Grocer Co.* v. *McKee Shoe Co.*, 87 Ill. App. 434. When Weiner died the dominion over his interest in the partnership was in his surviving partners; and when Hageman died, whatever interest he had in the partnership—either his own share thereof or in his relation as a surviving partner of Weiner—passed to Maton, the sole surviving partner, for settlement. * * *"

There was no dissolution of the partnership between the Petitioner's former husband and the Respondent until sometime after the divorce which was a voluntary dissolution, when a settlement between the parties was made (R. 34).

The only result of the divorce was the conversion of the Petitioner's community rights in the residual interest of her former husband under the Lambert & Jackson partnership into the rights of a tenant in common with her former husband in such residual interest. This residual interest proved to be, upon the dissolution of the partnership, an interest in certain oil and gas leases (R. 34) and in the release of the Petitioner's former husband's obligation or liability to discharge the partnership debts (R. 34).

While the Petitioner can assert her rights to her share of such residual interest, in an action against her former husband, which is a question not arising in the case at bar, she cannot interfere with the contractual relationship between her husband and others.

Russell v. *Russell,* Tex. Civ. App., 79 S. W. (2) 639, 641.

Assuming, for the sake of argument only, that a tenancy in common could arise between the Petitioner, her former husband and the Respondent, with respect to the partnership assets of the firm of Lambert & Jackson, it is a general rule that mere co-tenancy of property is insufficient to establish or raise a presumption of the existence of, a partnership between the co-tenants.

Clark v. *Sidway,* 142 U. S. 682, 35 L. Ed. 1157.

Thompson v. *Bowman,* 6 Wall. (U. S.) 316, 18 L. Ed. 736.

40 American Jurisprudence, Section 5, Page 129.

This Court has said in *Meehan* v. *Valentine,* 145 U. S. 611, 618, 36 L. Ed. 835:

> "The requisites of a partnership are that the parties must have joined together to carry on a trade or adventure for their common benefit, each contributing property or services, and having a community of interest in the profits. * * *"

It is very apparent that the essentials requisite to the establishment of a partnership between the Petitioner, F. B. Jackson, Jr., and the Respondent, Burr Lambert, have never existed. It was conclusively established that there was no contract, either express or implied, whereby the three (3) parties mentioned above placed their money, effects, labor and skill or some or all of them in the business venture together with the understanding that they were to divide the profits and bear the losses.

The Petitioner's assertion in her petition that the decision of the Seventh Circuit is at variance with the holdings of the Supreme Court of Texas and this Court, is wholly without merit, there being no citation of authority in point. To the contrary, it is submitted that the Seventh Circuit's decision in affirming the judgment of the Trial Court is in exact accord with the decisions of this Court and those of the Texas Courts cited by the Respondent.

Part III.

The Petition and Brief Fail to Disclose Any Reason for Review by Certiorari.

It is not contended that the decision of the Seventh Circuit in the case at bar conflicts with the decision of other Circuits on the same matter. There is no question of Federal Law involved nor has there been a decision of a Federal question which is in any way in conflict with applicable

decisions of this Court. It is submitted, that there is no showing of a departure from the accepted and usual course of judicial proceedings or any sanction of any such departure by a lower Court as to call for an exercise of this Court's power of supervision.

The Petitioner merely seeks another hearing and it is submitted that such relief is not afforded to a litigant by certiorari to this Court.

> *Magnum Import Co.* v. *DeSpoturno Coty,* 262 U. S. 159, 67 L. Ed. 922.

There certainly is no special or important reason apparent in this case which should impel this Court, in the exercise of a sound judicial discretion, to award the writ.

> *Layne & Bowler Corp.* v. *Western Well Works, Inc.,* 261 U. S. 287, 393, 67 L. Ed. 712.

Conclusion.

The Respondent respectfully submits that the Petitioner has wholly failed to establish grounds for a review of the decision of the Seventh Circuit and that her petition for writ of certiorari should be denied.

Respectfully submitted,

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